

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,
W.A. DREW EDMONDSON, in his
capacity as ATTORNEY GENERAL
OF THE STATE OF OKLAHOMA,
et al.

Plaintiffs,

V.

TYSON FOODS, INC., et al.,

Defendants.

No. 05-CV-329-GKF-SAJ

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DECEMBER 6, 2007

MOTION HEARING

BEFORE THE HONORABLE SAM A. JOYNER, Magistrate Judge

APPEARANCES:

For the Plaintiffs: Mr. Louis W. Bullock
Mr. M. David Riggs
Mr. Richard T. Garren
Mr. Robert A. Nance
Mr. David P. Page
Mr. Frederick C. Baker
Ms. Kelly S. Burch
Mr. J. Trevor Hammons
Mr. Daniel Patrick Lennington

For the Defendants: Mr. Robert W. George

Glen R. Dorrough
UNITED STATES COURT REPORTER



1 clearly indicates that the review that they requested of Jock
2 Worley's permit specifically dealt with water quality issues at
3 the Barren Fork which is a tributary to the Illinois River
4 Watershed. So I don't know that their argument necessarily
5 bears fruit in that sense because --

6 THE COURT: But they have not given you that stuff.

7 MS. LONGWELL: No, they haven't. In fact, they've
8 withheld documents that -- at the ODEQ which address
9 specifically water quality issues from Jock Worley. I mean,
10 we've gotten documents -- we have gotten documents, I wouldn't
11 misstate that to the Court, related to Jock Worley, but we have
12 the right, unless they have -- unless the State can establish
13 attorney-client privilege, we have the right to those documents
14 that have been withheld by ODEQ on Jock Worley.

15 Let me go back quickly to my argument. Basically,
16 Your Honor, as I stated, Jock Worley, there was an affidavit
17 with regards to Sequoyah Fuels but in the State's response with
18 regard to the attorney-client privilege, it only references the
19 affidavit provided by Ellen Phillips on Jock Worley. So with
20 regards to the other entries on Exhibit 8 to Peterson Farms'
21 motion, the State has provided no proof, has not met its burden
22 with regards to establishing attorney-client privilege as
23 indicated under Oklahoma law. It hasn't indicated as to all of
24 those entries whether they are a part of a pending
25 investigation, litigation, or claim being pursued by the

1 work product.

2 The State in its response to Peterson's motion, the
3 motion attempts to shift the burden to Peterson by arguing that
4 Peterson cannot pretend it doesn't know what actions or
5 litigation the items on the privilege log refer to. Now, Your
6 Honor, I think you've heard so many times in this case how many
7 boxes of documents were provided and how many pages of
8 documents were provided in this case. I can tell you it's over
9 a million by the State -- pages. Documents, it's probably
10 close to half a million. It's impossible for Peterson to
11 discern from the mass of documents what potential or actual
12 litigation applies to the subject document. We don't have the
13 knowledge of these agencies' reps -- representatives or
14 officers that helped the State prepare these privilege logs.
15 We don't have that knowledge, nor can we really garner that
16 knowledge from the documents we've obtained. And it's merely
17 an attempt by the State to shift their burden to identify the
18 potential or actual litigation the document was created and --
19 to Peterson and the other defendants in this case and it's
20 simply not appropriate.

21 The threshold determination of whether work product
22 applies requires the State to show that the primary motivating
23 purpose behind the document or investigative report must be to
24 aid possible future litigation. This is Dawson vs. New York
25 Life Insurance, 901 Fed. Supp. 1362. Now, despite Peterson's

1 which isn't certainly not determinative but, you know, we have
2 a classification called attorneys' eyes only group privilege or
3 for a protective order in this case. I mean, what great
4 calamity would befall the State of Oklahoma if I just said the
5 defendants are right, all of this stuff needs to be produced
6 pursuant to attorneys' eyes only? I mean, is the earth going
7 to stop, is there some great prejudice, is there some pending
8 litigation you have that's going to immediately go to hell
9 because of some production you've had to make?

10 MR. NANCE: Probably the earth would not stop, I think
11 we can agree about that. But once the privilege is out, I
12 mean, it's out. I hadn't thought through what the waiver
13 issues would be once it was -- once the toothpaste is out of
14 the tube, whether Sequoyah Fuels could come in and say, well,
15 it's out of the tube, we want everything you produced over
16 there. We want your work product with regard to us and what
17 your experts say and what your legal strategies are.

18 THE COURT: I hadn't thought about that. I don't know
19 whether it would waive it for third parties or not.

20 MR. NANCE: And neither do I. You've just posed a
21 question and I haven't had a time to think about that as the
22 question deserves.

23 THE COURT: Okay. Well, let me ask you another
24 question that you haven't had time to think about either. They
25 are arguing that some of what's on your privilege log describes

1 what other sources have placed into the environment as an
2 alternative source of pollution to the watershed and that
3 there's information within these privileged documents that talk
4 about, I suppose, Jock Worley or Sequoyah Fuels or anybody's
5 contribution to the watershed that would have caused the
6 effects you say they have caused. Is that true?

7 MR. NANCE: I can't speak for all of the documents.
8 It might be that some of those documents deal with some of the
9 constituents that are at issue in this case. Sequoyah Fuels
10 really doesn't unless things can migrate uphill.

11 THE COURT: Right.

12 MR. NANCE: And so I don't think that's really an
13 issue there.

14 THE COURT: Okay. Well --

15 MR. NANCE: That goes to whether or not they have an
16 extraordinary need and no other way to get to our attorney-
17 client or work product documents. And counsel, I think counsel
18 pretty well conceded that we have given a vast amount of
19 documents, particularly about Sequoyah Fuels. We've given them
20 Jock Worley's entire permit work file. There is a great deal
21 of material there that is unprivileged we have not claimed any
22 privilege for that they have got that I think takes away any
23 extraordinary need they might claim to have the work product
24 stuff.

25 THE COURT: Well, if there is documents for which your

1 candid to say that -- you asked where are the cases that work
2 product doesn't apply if it's not closely related. And counsel
3 very candidly said, well, I looked wholeheartedly and I
4 couldn't find any. So I think under the dictum in Grolier and
5 in Frontier Refining, once it's work product, it's protected.
6 It's protected period whether or not any subsequent case is
7 closely related or not.

8 But we get a bit of an irony here. I guess Peterson
9 says, well, you know, Sequoyah Fuels or Jock Worley isn't
10 closely related but we want it anyway because it's relevant.
11 Is it closely related because maybe they're putting
12 constituents in the water? I mean, they can't have that really
13 both ways probably. It's a constituent so it's closely
14 related. Well, no, it's not closely related but it's relevant.
15 It's certainly relevant enough that they've asked for it. And
16 even if there were a closely related requirement, which there
17 isn't, I think that would afford us some protection. We've
18 cited the Heggestad vs. Department of Justice case for the
19 proposition that work product protection extends to documents
20 prepared in anticipation of foreseeable litigation even if you
21 don't know what a specific claim was going to be.

22 They claim that we're hiding these documents, we're
23 hiding the secrets and the truth. You know, we've given them
24 on Sequoyah Fuels 35 boxes of stuff. I read a couple of those
25 boxes. A lot of material there. But the fact that our

1 consultants give scientific material to the attorney general's
2 office on groundwater is -- it's just protected as work
3 product. And in order to frame whatever it is they are going
4 to frame, they don't need to know that, particularly in
5 Sequoyah Fuels, because groundwater doesn't migrate from below
6 the dam to above the dam. They are simply not entitled to it.

7 They listed a bunch of things in their brief. I mean,
8 they did make a few specific challenges to specific entries.
9 In our brief, I think starting at page 14, we respond to those.
10 ODEQ entry number 7, that's a letter from an ODEQ lawyer
11 transmitting to ODEQ some material from Ms. Burch who is
12 obviously an attorney for the State covered by the
13 attorney-client and work product both. ODEQ 105, Assistant
14 Attorney General Jeannine Hale faxed to her client at ODEQ
15 something about the Worley gravel mine which, as we said, is
16 subject to ongoing proceedings. But every one of the ones they
17 have is something from a lawyer to a client or a client to a
18 lawyer and those are the specific ones they picked out.

19 We've given them the unprivileged stuff. It's not
20 like this is all there is. This is all that is -- that is
21 protected. And because we've given them such a volume of
22 material, they don't have an extraordinary need for our work
23 product. Whatever their experts need, I guess you always want
24 to know the other side's secret, but besides that salacious
25 desire to know what the other side is doing in the context of

1 attorney-client work product or attorney-client privilege.
2 They have got an enormous amount of data, an enormous amount of
3 material and they can build their case as they see fit. And I
4 think this motion is just part of an increasingly desperate
5 ploy on the part of the defendants to focus the attention on
6 discovery and to ignore all of the pollution.

7 THE COURT: I think we've agreed that there is some
8 data you are protecting by work product which is relevant to
9 discharges into this environment.

10 MR. NANCE: I think there would be some. And I
11 couldn't point to them specifically but there's probably some.

12 THE COURT: Now if there is some, from what ever other
13 source can they obtain that information other than the work
14 product you're talking about?

15 MR. NANCE: Well, if it's more than five years back,
16 at least at this point it doesn't count. So if you're looking
17 at something about Lake Frances in 1989, it's out by the
18 five-year rule. They don't necessarily need, I don't think,
19 every bit of data we've got, particularly in Sequoyah Fuels.

20 THE COURT: Just the part that helps them.

21 MR. NANCE: No, Judge, really not.

22 THE COURT: Well, okay, if it's within the five years.
23 I mean, if there is data in regard to discharge into the IRW,
24 they can't get that from any other source.

25 MR. NANCE: Well, not necessarily. I mean, there may